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In the Supreme Court of the United States

OCTOBER TERM, 1957

JAMES S. RAIDY, PETITIONER

v.

UNITED STATES OF AMERICA AND BETHLEHEM STEEL COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 1a, pp. 61-68) is reported at 153 F. Supp. 777. The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 16-17) is reported at 252 F. 2d 117.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1958. The petition for a writ of

certiorari was filed on April 18, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether both courts below correctly declined to permit recovery against a shipowner for alleged breach of a warranty of seaworthiness in a suit brought by a shipfitter engaged, at the time of his injury, in a part of the major reconstruction of the vessel in drydock by his shipyard employer, where his fall resulted from the removal of a walkway plate by the repairing shipyard, for the substitution of another as required by the contract specifications.

2. Whether both courts correctly held that the shipowner was not negligent in the circumstances of this case.

STATEMENT

This action, filed pursuant to the Public Vessels Act, 46 U.S.C. 781, *et seq.*, was instituted to recover damages from the United States for injuries sustained by petitioner in a fall on board the dredge *Goethals*, owned by the United States and operated by the Army Corps of Engineers for dredging harbors and other navigable waters. The undisputed basic facts, as found by the District Court, are as follows:

The accident took place in the drydock of the Bethlehem Steel Company, Shipbuilding Division, where the dredge *Goethals*, a seagoing hopper dredge of about 9,000 tons displacement, was undergoing com-

plete reconstruction and conversion of its dredging mechanism, as well as extensive overhauling and repairs, at an approximated cost in excess of $600,000 (R. 1a, p. 62). The *Goethals* was delivered to Bethlehem on September 14, 1954, and remained in its possession until completion of the work on December 9, 1954 (R. 1a, p. 63). During this period, the crew of the dredge was dismissed, the power and engines were shut down, and Bethlehem, as required by contract, furnished all power, lighting and staging needed on the job (R. 1a, p. 63). The Government reserved a bare right to inspect the work and materials to insure compliance with contract specifications, but Bethlehem alone had control over the manner of performance, and the scheduling and progress of all phases of the reconstruction (R. 1a, pp. 62-63).

There was no contention made that, when the dredge was turned over to Bethlehem for major reconstruction, it was in any way unseaworthy or, most important here, that any of the steel plates, making up the walkway from which petitioner fell, were missing. In fact, one of the repair jobs required by the contract was the removal of the steel plates, each about three feet square, making up the dredge's walkways (R. 1a, pp. 63, 68). Removal of these plates was necessary to permit access to pipes and other machinery under the walkways. Moreover, the contract specifications required that Bethlehem ultimately replace the steel plates with new aluminum floor plates (R. 1a, p. 68; 3a, pp. 35-36).

On the date of the accident, October 27, 1954, the *Goethals* had been in a drydock of the Bethlehem

Steel Company for three days (R. 1a, p. 63). It had been placed there to facilitate the installation of new hoppers or mixing wells by skilled shipfitters and other repairmen of the Bethlehem Company (R. 1a, p. 63). Petitioner was employed by Bethlehem as a shipfitter and was engaged in the installation of the mixing wells (R. 1a, p. 63). In order to obtain proper alignment of one of these wells, a Bethlehem foreman instructed petitioner and another shipfitter to proceed along a steel plate walkway and run a chalk line measurement (R. 1a, p. 63). Uncontradicted evidence established that installation and alignment of these mixing wells were tasks within the special competence of shipyard shipfitters and beyond the knowledge, training or experience of seamen (R. 1a, p. 64; 3a, p. 41).

While engaged in running the chalk line measurement, petitioner backed along the walkway, felt his way around a work bench or staging platform placed on the walkway by Bethlehem in the conversion work, and, continuing to back up, fell through a hole in the walkway caused by the removal of a steel plate by Bethlehem employees as part of the repair work (R. 1a, p. 63). This plate, as well as six or seven others on the walkway, had been removed by Bethlehem to allow access to the pipes and other structures underneath (R. 1a, pp. 63-64).

In his libel filed in the District Court (R. 1a, pp. 1-4), petitioner sought recovery on the alternative theories that his injuries were caused either by reason of the unseaworthiness of the *Goethals* or by the negligence of agents of the United States. The criti-

cal allegations of the libel were denied by the United States (R. 3a, pp. 2-5).[1]

A full trial was held. Based on its careful scrutiny of the evidence, the District Court held that the ship was not unseaworthy in the circumstances of this case (R. 1a, pp. 64, 68). The court emphasized that the major reconstruction of the dredge by Bethlehem in drydock and the skilled shipfitting work done by petitioner were neither "the type of services historically and traditionally rendered to the ship by members of the crew" nor could they currently be performed without the "facilities and skilled personnel of a modern well equipped shipyard" (R. 1a, p. 64). Of equal significance in the District Court's view was the fact that the *Goethals* was turned over to Bethlehem with its metal walkways fully intact and that the removal of the plate causing petitioner's fall was accomplished by the shipyard in its performance of contract specifications (R. 1a, p. 68). The District Court also held that there was no negligence on the part of government employees causing or contributing to petitioner's injury (R. 1a, pp. 64, 68).

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed, *per curiam*, adopting the District Court's opinion as its own (Pet. App. 16-17).

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[1] Asserting a contractual and common law right to indemnity, the United States impleaded petitioner's employee, the Bethlehem Steel Company, as a third-party respondent (R. 3a, pp. 5-9). The District Court ruled that, as the shipowner was not liable, "there [was] no occasion to consider possible liability of Bethlehem as an impleaded respondent" (R. 1a, p. 68). The Court of Appeals' disposition of the original action rendered it unnecessary to consider the Government's appeal from this aspect of the decision.

ARGUMENT

The District Court and the Court of Appeals correctly held that, under the controlling principle for recovery on the basis of unseaworthiness as established by this Court in *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, and applied by this Court in subsequent decisions,[2] a shipowner is not liable in the circumstances of this case. The decisions below are in complete conformity with the rule of those cases, *i.e.*, that while the warranty of seaworthiness is not restricted exclusively to seamen, those who are entitled to its protection must be doing seamen's work and incurring seamen's hazards. Contrary to petitioner's position, there is no conflict with the decisions of this Court, or with decisions of other Courts of Appeals which have consistently applied this principle to varying factual situations. Indeed, the rulings here were expressly based on, and are in accord with, the recent decision of the Court of Appeals for the Ninth Circuit in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, involving substantially identical facts, in which this Court recently denied a petition for a writ of certiorari, 354 U.S. 938. Moreover, petitioner's contention of conflict with other decisions in regard to that part of the holding exonerating the United States from negligence is equally unfounded. Accordingly, there is no occasion for further review by this Court.

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[2] *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406; *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, affirming, *per curiam*, *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478 (C.A. 9).

1. It has been established by this Court that a shipowner's obligation to provide a seaworthy ship extends to individuals other than seamen if, at the time of the injury, they were doing seamen's work and were exposed to seamen's hazards.[3] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 95, 99. In two subsequent decisions, the Court has reaffirmed this conclusion. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, recovery for unseaworthiness was expressly predicated on the type of work done by the claimant and its relationship to the historical concept of the "ship's service." Since the work involved only repair of a "slight defect" in the loading equipment and was inextricably related to the loading process itself, work said by this Court to be traditionally and historically within the scope of the crew's duties, the Court affirmed the holding of the Court of Appeals permitting recovery on the ground of unseaworthiness. And in *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit[4] granting the protection of the warranty of seaworthiness to a workman injured by a breaking block also while engaged in the ship's service of loading and unloading.[5]

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[3] In *Sieracki*, the claimant was a stevedore injured while aboard and loading the shipowner's vessel.

[4] *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478.

[5] While the block apparently belonged to the stevedoring company, that company had been offered the option by the shipowner of using its own or the ship's block, thus providing the basis for considering the equipment that of the ship. See *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, 387 (C.A. 9), certiorari denied, 354 U.S. 938.

Thus, each of the relevant pronouncements by this Court has been limited to the factual context of work done in the loading and unloading of the shipowner's vessel, work considered by the Court an historical function of the seaman. Not one of these decisions provides a basis for petitioner's suggestion that the guiding criterion of "ship's service" encompasses any and all work accomplished by workmen on a vessel, whether or not the work is part of major reconstruction in drydock, or whether or not a step in the process of reconstruction is the sole causative factor in the accident. When it is recognized that petitioner's work in the reconstruction and conversion of the *Goethals* in drydock was not substantially different from his work in constructing new ships, it becomes immediately apparent that acceptance of petitioner's view of the *Sieracki* standard of seamen's work obliterates that standard completely.[6]

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[6] The majority opinion in *Sieracki* implicitly excepted from application of the seaworthiness protection to non-seamen those situations where the perils aboard ship were obvious, or the action of the contractor-employer of the claimant created the cause of the accident. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 95. This latter consideration is squarely in point here. The *Goethals* was brought into Bethlehem with walkway plates fully intact, and Bethlehem, having complete control over when and how the steel plates were to be removed and replaced, along with supervision over all other phases of reconstruction, was solely responsible for creating the situation which resulted in petitioner's fall. As the District Court remarked in its opinion here, "[i]t seems * * * a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship.'"

As we have said, both courts below relied on the decision in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938, where the critical facts were similar to those here. The claimant in that case was a workman of a shipyard corporation engaged in major repairs of the shipowner's vessel in drydock. While repairing the propulsion machinery of the vessel, a grinding wheel furnished claimant by the shipyard corporation disintegrated causing his injury. In rejecting the argument that the *Sieracki* rule was applicable, the Court of Appeals observed (238 F. 2d at 387):

> The facts in this instant case would extend the doctrine of absolute liability for unseaworthiness * * * beyond any previous holdings. Here the repairs had nothing to do with loading or unloading the ship. The propulsion machinery of the vessel itself was being repaired. Not all repairs are "ship's work", to be performed, historically or currently by the crew. * * * In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the "ship work" time, but were of sufficient importance to cause the ship to be drydocked.
>
> The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends, when the vessel is not on water. * * *

These considerations, we submit, are equally pertinent to the facts here.

Petitioner's assertion of a conflict between the decision below and decisions in other courts of appeals

(Pet. 5-7) is without merit. The *Sieracki* rule must be fitted to innumerable factual situations, and differences in results, reached by applying the same controlling principle of law, cannot properly be characterized as "conflicts". See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393. In any event, petitioner cites no decision which has extended the protection of seaworthiness to one engaged in major reconstruction in drydock who is injured by a condition created solely by his employer. In *Read* v. *United States*, 201 F. 2d 758, the Court of Appeals for the Third Circuit granted the protection of seaworthiness to a workman injured by reason of the shipowner's failure to maintain adequate lighting aboard, where, unlike here (see p. 3, *supra*), the shipowner was responsible for the lighting. In *Christiansen* v. *United States*, 192 F. 2d 199, the Court of Appeals for the First Circuit denied the protection to an employee of a shipcleaning firm since that firm, in not providing him with a ladder or platform on which he could work, was responsible for his fall. Rather than being in conflict, this decision is in accord with the holding here. Finally, in both cases from the Court of Appeals for the Sixth Circuit relied on by petitioner,[7] the decisions were expressly predicated on negligence and not on unseaworthiness.

Nor does the granting of a petition for a writ of certiorari in *Lester* v. *United States*, 234 F. 2d 625, (C.A. 2), certiorari granted 352 U.S. 889, advance

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[7] *Pioneer Steamship Company* v. *Hill*, 227 F. 2d 262; *Imperial Oil, Limited* v. *Drlik*, 234 F. 2d 4.

petitioner's cause.[8] In that case, the district court ruled[9] that a duty to install a handrail on a pilothouse roof was recognized by the shipowner in the original contract of repair and that failure to discharge this duty was the causative factor in the repairman's injury. The Court of Appeals reversed, holding that no such inference could be drawn from the contract provision and that, in the circumstances, the shipowner had provided the repairman with a safe place to work. The primary question presented for this Court's review on certiorari was whether the Court of Appeals properly reversed the District Court's judgment in view of the "clearly erroneous" rule as applied to admiralty proceedings. See *McAllister* v. *United States*, 348 U.S. 19.

It is thus apparent that there is no conflict in principle here with decisions of this Court or of other Courts of Appeals on the *Sieracki* doctrine. The courts below properly found that, upon careful examination of the factual situation presented, petitioner's work and the circumstances of his injury were far removed from the standard of liability established in *Sieracki* and subsequent decisions.

2. Petitioner also contends that the ruling exonerating the United States from liability for negligence presents a conflict with decisions of other courts of appeals. However, this argument is without merit in that it is grounded on the erroneous assumption that the District Court determined this issue solely

[8] The case was dismissed from this Court's docket upon conclusion of a settlement between the parties.

[9] 127 F.Supp. 113 (E.D. N.Y.).

on the fact that the shipowner surrendered control of the vessel to Bethlehem. In fact, the District Court after detailed treatment of the facts surrounding the contract of reconstruction, the limited right of inspection afforded the United States under that contract,[10] the accident itself, and the condition of the ship, correctly found that there was no negligence on the part of the United States "with respect to the condition of the ship or causing the [petitioner's] injuries" (R. 1a, p. 68). These findings with regard to negligence were properly upheld by the Court of Appeals which is bound by the decision of the District Court unless that decision is clearly erroneous. *McAllister* v. *United States*, *supra*. There is thus no basis for petitioner's suggestion that the holding with regard to negligence "is contrary to the decisions in the other circuits" (Pet. 12).

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[10] The United States inspectors aboard were limited by contract to inspect completed work items and materials used to insure compliance with contract specifications (R. 1a, pp. 62-63). They had no right of supervision over the manner in which any work was performed or over any employee of Bethlehem.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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